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APPENDIX

..co · Supreme Court, U.S
FILED
FEB 16 1984
ALEXANDER L. STEVAS,
CLERK

STATE OF NEW YORK

SUPREME COURT : COUNTY OF ALBANY

IN THE MATTER OF TOP TILE BUILDING SUPPLY CORP., TOP CARPET CORP., NORMAN L. STONE, RICHARD STONE,

Petitioners,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, INDIVIDUALLY AND AS COMMISSIONERS OF THE STATE TAX COMMISSION,

Respondents.

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES.

(Supreme Court, Albany County Special Term, April 16, 1982. Calendar No. 33)

(JUSTICE GEORGE L. COBB PRESIDING)

APPEARANCES:

Lorentz W. Hansen, for petitioners.

Robert Abrams, Attorney-General
(Frank Dow of counsel), for
respondents.

COBB, J.

In this article 78 proceeding, wherein the petitioners seek judicial review of the State Tax Commission's determination of October 23, 1981 which upheld, in part, and modified, in part, certain notices of determination of additional sales and use taxes said to be due from petitioners, respondents move pursuant to CPLR 7804 (subd. [f]) to dismiss the instant proceeding upon the ground that it was not commenced within the four-month period described in CPLR 217 and section 1138 of the Tax Law and upon the further ground that the petitioners have failed to file the bond or deposit of the "amount of any tax sought to be reviewed" as demanded by section 1138 (subd. [a], par. 4) of the Tax Law.

Since it appears that the petitioners neither deposited the amount of tax at issue herein nor posted an appropriate undertaking as demanded by section 1138 (subd. [a], par. 4) of the Tax Law, this court lacks jurisdiction to entertain the instant proceeding and dismissal must be ordered whether or not it was timely instituted (Matter of J.C. Penney Co. v. New York State Tax Comm., 86 AD2d 705). Accordingly, the dismissal motion will be granted.

Submit order on notice.

Dated: August 6, 1982

All papers to attorney for respondents.

Supreme Court - Appellate Division

Third Judicial Department

May 12, 1983 44363

In the Matter of TOP TILE BUILDING SUPPLY CORP. ET AL., Appellants,

v.

NEW YORK STATE TAX COMMISSION et al., Respondents.

Appeal from a judgment of the Supreme Court at Special Term (Cobb, J.), entered September 20, 1982 in Albany County, which dismissed petitioners' application, in a proceeding pursuant to CPLR article 78, to annul a determination of the New York State Tax Commission which upheld in part and modified in part notices of determination of additional sales and use taxes due.

Following a formal hearing, respondents modified in part (in petitioners' favor) notices of determinations and

demands for payment of sales and use taxes due, and as modified, denied applications for revisions. Respondents' determination was made October 23, 1981 and, as appears from an affidavit in the record, the determination was served upon petitioners by certified mail sent the same day. These proceedings were commenced by service of a notice of petition and verified petition on February 26, 1982. Petitioners did not deposit the tax, penalty and interest due nor did they file an undertaking (Tax Law, § 1138, subd. [a], par. [4]). Special Term held that these omissions deprived the court of jurisdiction and dismissed the petition without reaching the issue of the timeliness of the proceeding.

Initially, we note that Special Term failed to address itself to those aspects of the petition which first attacked the constitutionality of section 1138 (subd.

[a], par. [4]) of the Tax Law and, in the amended petition, alleged violation of due process in the manner respondents construed the statute. The court limited its decision to finding that failure to pay the tax at issue or post an undertaking deprived the court of jurisdiction. While an article 78 proceeding is generally the proper vehicle to determine whether a statute, ordinance or regulation has been applied in an unconstitutional manner (Matter of Overhill Bldg. Co. v. Delany, 28 N Y 2d 449, 458), the rule is different when the issue is the constitutionality of legislative action (Matter of Kovarsky v. Housing & Development Admin. of City of N. Y., 31 N Y 2d 184, 191). It has consistently been held that a proceeding under article 78 is not the proper vehicle to test the constitutionality of legislative enactments (Press v.

County of Monroe, 50 N Y 2d 695, 702). However, this court may, and, in reliance on CPLR 103 (subd. [c]), does hereby remedy the procedural infirmity by converting the article 78 proceeding to a declaratory judgment action and thereupon reach the merits (Matter of Ames Volkswagen v. State Tax Comm., 47 N Y 2d 345). In our analysis, we find that this court has held that payment of the tax imposed and the filing of an undertaking are conditions precedent to the maintenance of judicial review of Tax Commission determinations and that non-compliance deprives the court of jurisdiction (Matter of J.C. Penney Co. v. New York State Tax Comm., 86 A D 2d 705, mot. for lv. to app. den. 56 N Y 2d 507; Matter of Cooper v. Tully, 79 A D 2d 757). Petitioners, in attempting to distinguish these two cases, contend that no constitutional issue appears to have been raised properly in either case.

However, in Matter of O'Driscoll v. State Tax Comm. (Supreme Ct., Albany County, October 28, 1980, KLEIN, J., affd. 86 A D 2d 721, app. dsmd. 56 N Y 2d 644), the constitutionality of the statute was squarely before the court and was upheld (see Matter of Western Electric Co. v. Taylor, 276 N.Y. 309; Matter of Hochman v. State Tax Comm., 68 Misc 2d 781). Since it is conceded that petitioner has failed to comply with statutory requirements, there can be no judicial review.

Petitioner's remaining arguments directed to the validity of the assessment, the hearing, the determination itself, and the timeliness of these proceedings, need not be reached.

Judgment modified, on the law, by adding thereto a provision declaring that the deposit and undertaking requirements of section 1138 (subd. [a], par. [4])

of the Tax Law are constitutional, and, as so modified, affirmed, with costs to respondents.

MAHONEY, P.J., SWEENEY, KANE, CASEY and WEISS, JJ., concur.

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court,
held at Court of Appeals Hall
in the City of Albany on the
fifteenth day of September A.D. 1983

PRESENT, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

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3 Mo. No. 735

In the Matter of Top Tile Building Supply Corp., Top Carpet Corp., Norman L. Stone, Richard Stone,

Appellants,

vs.

New York State Tax Commission, et al.,

Respondents,

For a Judgment &c.

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellants in the above cause to this

Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that the appellants are not aggrieved by the modification at the Appellate Division (CPLR 5601[a][iii]), and that no substantial constitutional question is directly involved.

/s/ Joseph W. Bellacosa
Clerk of the Court

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
TOP TILE BUILDING SUPPLY CORP.
and NORMAN L. STONE and RICHARD STONE,
Individually and as Officers
for Revision of a Determination or for
Refund of Sales and Use Taxes under
Articles 28 and 29 of the Tax Law for
the Period December 1, 1967 through
February 28, 1974.

In the Matter of the Petition
of
TOP CARPET CORP.
and NORMAN L. STONE and RICHARD STONE,
Individually and as Officers
for Revision of a Determination or for
Refund of Sales and Use Taxes under
Articles 28 and 29 of the Tax Law for the
Period December 1, 1967 through May 31,
1973.

DECISION

Petitioners, Top Tile Building Supply Corp., Top Carpet Corp. and Norman L. Stone and Richard Stone, Individually and as Officers, 237 Mamaroneck Avenue, White Plains, New York 10605, filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law. Top Tile Building Supply Corp. filed a petition for the period December 1, 1967 through February 28, 1974 (File No. 14362). Top Carpet Corp. filed a petition for the period December 1, 1967 through May 31, 1973 (File No. 14361).

A formal hearing was held before William J. Dean, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1979 at 1:15 P.M. and was continued on January 31, 1980, and on February 1, 1980. Petitioners appeared

by Lorentz W. Hansen, Esq. The Audit Division appeared by Ralph J. Vecchio, Esq. (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

I. Whether the assessments against petitioners are barred by the period of limitations provided for in section 1147 (b) of the Tax Law.

II. Whether the field audit properly determined the sales tax due.

III. Whether Norman L. Stone and Richard Stone are personally liable for any taxes due pursuant to section 1131 of the Tax Law.

FINDINGS OF FACT

1. On November 8, 1973, the Audit Division, on the basis of an estimate, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Top Tile Building Supply Corp. ("Top Tile"), for taxes due

of $82,985.77, plus penalty and interest of $30,596.35, for a total of $113,582.12. On April 2, 1976, the Audit Division issued an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Top Tile for taxes due of $24,520.02, plus penalty and interest of $19,717.47, for a total of $44,237.49. The notice dated April 2, 1976 was in addition to, and did not supersede, the notice dated November 8, 1973.

2. At the hearing it was stipulated that, with regard to Top Tile, the amount of tax at issue was $64,697.37.

3. On November 20, 1973, the Audit Division, on the basis of an estimate, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Top Carpet Corp. ("Top Carpet"), for taxes due of $13,262.09, plus penalty and interest of $4,373.11,

for a total of $17,635.20. On April 2, 1976, the Audit Division issued an additional Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Top Carpet for taxes due of $3,011.72, plus penalty and interest of $1,825.04, for a total of $4,836.76. The notice dated April 2, 1976 was in addition to, and did not supersede, the notice dated November 20, 1973.

4. At the hearing it was stipulated that, with regard to Top Carpet, the amount of tax at issue was $7,775.43.

5. The audit of Top Tile and Top Carpet was originally assigned to the New York City District Office in 1970 where the offices of both petitioner corporations were located. The corporate offices were moved to White Plains and the corporations changed the location where their records were stored several times during 1971 through 1973. As a

result, the audit was reassigned but never completed.

On October 26, 1973, the audit was assigned to Frances Schaeffer, an auditor in the White Plains District Office. She made an initial appointment with the vendors' accountant which was subsequently cancelled. At that time, the auditor mailed to Norman L. Stone, President of Top Tile, consents extending the period of limitations for both Top Tile and Top Carpet. The consents, dated October 29, 1973, were executed by Norman L. Stone and received by the White Plains District Office on November 5, 1973. Both consents extended the periods of limitation until December 20, 1974. Each corporation had previously submitted consents extending the periods of limitation in January 1971, October 1971, and November 1972.

Mrs. Schaeffer was of the opinion that the repeated transfer of the records

indicated that the vendors were avoiding an audit. She discussed the matter with her supervisor and at his direction prepared estimated assessments against both corporations increasing reported sales by 20 percent.

6. In February, 1974, the audit was assigned to auditor Donald Bryant of the Albany District Office. Mr. Bryant began his examination on October 28, 1974, and submitted his reports on November 5, 1975. The audit procedures used were as follows:

(a) The first phase of the audit of Top Tile involved the selection of two (2) one-week test periods, February 1-6, 1969 and September 1-7, 1971. A one-week test period, September 1-7, 1971, was selected for Top Carpet. The sales records of each corporation were examined and it was determined that both Top Tile and Top Carpet owed additional sales tax for the test period in the amounts of $129.57 and

$36.10 respectively. The result of the test period audits were used to calculate error ratios in the petitioner's reporting of sales tax. These error ratios were then projected over the full periods covered by the audits.

(b) In addition to using these test periods to calculate uncollected taxes, the auditor examined petitioners' daily sales sheets to determine unreported taxes. From these sheets the sales tax actually collected during the entire audit period was compared to the sales tax reported. It was determined that Top Tile had failed to report $31,951.45 in sales tax it had collected and Top Carpet had failed to report $2,625.69 in sales tax it had collected.

7. While the audits were being conducted, petitioners made their records available to Mr. Bryant. These included original sales invoices, original purchase

invoices, purchase journals, ledgers, and daily cash sheets. Because the audit covered an extended period and involved records of numerous stores, the documents made available to the auditor were voluminous.

8. Top Carpet was formed for the benefit of former employees of Top Tile. No shares of Top Carpet stock were given to Norman L. Stone or to Richard Stone. Top Tile provided bookkeeping and sales tax preparation assistance to Top Carpet. Neither Norman L. Stone nor Richard Stone were officers of Top Carpet.

9. Norman L. Stone was president of Top Tile and Richard Stone was treasurer of Top Tile. Both had major responsibility for the management and affairs of Top Tile.

CONCLUSIONS OF LAW

A. That the consent extending the period of limitations executed by Norman

Stone on behalf of Top Tile in November of 1973 was valid since he was an officer of that corporation and as such was authorized to sign such a consent. Therefore, no portion of the assessment included in the Notice of Determination issued to Top Tile was barred by the period of limitations provided by section 1147(b) of the Tax Law. However, the consent extending the period of limitation executed by Norman Stone on behalf of Top Carpet was invalid since he was neither an officer nor was he a person authorized by that corporation to sign such a consent.

B. That the Audit Division was justified in issuing estimated assessments against Top Tile and Top Carpet in November, 1973, since petitioners had repeatedly delayed in making their books and records available.

C. That section 1147(b) of the Tax Law provides that "no assessment of

additional tax shall be made after the expiration of more than three years from the date of the filing of a return". Since the Notice of Determination was issued against Top Carpet on November 20, 1973 and since no valid consents extending the period of limitations were executed, that portion of the assessment against Top Carpet relating to taxable quarters prior to September 1, 1970, must be cancelled.

D. That "Although there is statutory authority for the use of a 'test period' to determine the amount of tax due when a filed return is incorrect or insufficient (Tax Law, §1138, subd. [a]), resort to this method of computing tax liability must be founded upon an insufficiency of record keeping which makes it virtually impossible to verify taxable sales receipts and conduct a complete audit... However, if records are available from

which the exact amount of tax can be determined, the estimate procedures adopted by the respondent become arbitrary and capricious and lack of rational basis." Chartair, Inc. v. State Tax Commission, 411 N.Y.S.2d 41; therefore, the Audit Division was not justified in using the "test period" audit procedures described in Finding of Fact "6(a)" since petitioners had, by the time of the actual audits, made their books and records available to the auditor and these records were sufficient for determining the exact amount of tax due. Since these records were made available, only those portions of the assessments against Top Tile and Top Carpet which were based directly upon petitioners' records can be sustained. Those portions include the actual sales tax found to be due during the one and two week test periods of Top Carpet and Top Tile, and also the amounts of unreported

sales tax as were discovered by the audit procedures described in Finding of Fact "6(b)".

E. That Norman L. Stone and Richard Stone were persons required to collect tax for Top Tile with respect to section 1131 of the Tax Law. Norman L. Stone served as President of Top Tile and Richard Stone as Treasurer. Both had major responsibility for the management and affairs of Top Tile.

F. That Norman L. Stone and Richard Stone were not persons required to collect tax for Top Carpet with respect to section 1131 of the Tax Law. Neither Norman L. Stone nor Richard Stone served as an officer of Top Carpet.

G. That the petitions of Top Tile Building Supply Corp., Top Carpet Corp. and Norman L. Stone and Richard Stone, individually and as officers, are granted to the extent indicated in Conclusions of

Law "C", "D" and "F"; that the Audit Division is directed to modify the notices of determination issued on November 8, 1973, November 20, 1973 and April 2, 1976; and that, except as so granted, the petitions are in all other respects denied.

DATED: Albany, New York

OCT 23 1981

STATE TAX COMMISSION

/s/ James H. Tully, Jr.

PRESIDENT

/s/ Francis R. Koenig

COMMISSIONER

/s/ (signature illegible)

COMMISSIONER

SUPREME COURT - COUNTY OF ALBANY

In the Matter of TOP TILE BUILDING SUPPLY CORPORATION, TOP CARPET CORPORATION, NORMAN L. STONE and RICHARD STONE,

Appellants,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, individually and as members of the State Tax Commission,

Respondents.

JUDGMENT

INDEX NO. 3381-82

Top Tile Building Supply Corporation, Top Carpet Corporation, Norman L. Stone, and Richard Stone, the Appellants herein represented by Lorentz W. Hansen, Esq., 175 Main Street, White Plains, New York 10601, having taken an appeal to the Court

of Appeals from an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Appellate Division on the 13th day of May, 1983, and the Court of Appeals, after due deliberation, having rendered a decision on the 15th day of September, 1983, granting the Notice of Motion to Dismiss the appeal made by the appellants, ordering that the said motion to dismiss be and the same hereby is granted, with costs and twenty dollars costs of motion, and an order having been entered so affirming it is hereby:

ADJUDGED, that the aforesaid motion be, and the same hereby is denied, with costs of $85.00 to Respondents the New York State Tax Commission, the New York State Department of Taxation and Finance; James H. Tully, Jr., Milton Koerner, Thomas H. Lynch, individually and as

members of the State Tax Commission, Executive Bureau, State Campus, Tax and Finance Building, Albany, New York 12227, and that the Respondents have execution thereon.

/s/ Guy D. Paquin
Clerk

DATED AND ENTERED: Sept. 29, 1983

(SEAL) STATE OF NEW YORK)
ss.:
COUNTY OF ALBANY CLERK'S OFFICE)

I, GUY D. PAQUIN, Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy JUDGMENT with the original thereof filed in this office on the 29 day of Sept 1983 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed my official seal, this 29 day of Sept 1983

/s/ Guy D. Paquin Clerk

State of New York

Supreme Court - County of Albany

In the Matter of TOP TILE BUILDING SUPPLY CORP., TOP CARPET CORP., NORMAN L. STONE, RICHARD STONE,

Petitioners-Appellants,

-against-

NEW YORK STATE TAX COMMISSION; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; JAMES H. TULLY, JR., MILTON KOERNER, THOMAS H. LYNCH, Individually and as Commissioners of the State Tax Commission,

Respondents-Respondents.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

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INDEX NO. 3381-82

NOTICE OF APPEAL

Sirs:

PLEASE TAKE NOTICE that the above named petitioners, Top Tile Building Supply Corp., Top Carpet Corp., Norman L. Stone

and Richard Stone hereby appeal to the Supreme Court of the United States from the judgment in the above-captioned matter entered in the Supreme Court, County of Albany, State of New York on the 29th day of September, 1983, pursuant to an order of the New York Court of Appeals dismissing the petitioners appeal to that court, and from each and every part of the aforesaid judgment. Said appeal is taken pursuant to Title 28 United States Code. Section 1257(2).

Yours, etc.

Lorentz W. Hansen

cc: Attorney General, State of New York
c/o Francis V. Dow
Assistant Attorney General
Department of Law
Albany, N.Y. 12224

Certificate of Attorney

Filed: Supreme Court

Albany County, New York

and Appellate Division

Third Department

December 23, 1983

/s/ Lorentz W. Hansen, Esq.